Supreme Court, U.S.
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No. 85-212

In The
Supreme Court of the United States
October Term, 1985

RUDY JAMES MARTIN,

Petitioner,

v.

TWO "R" DRILLING COMPANY, INC.,
and
EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHILIP E. HENDERSON
CHARLES HANEMANN
OF
HENDERSON, HANEMANN & MORRIS
A Professional Law Corporation
300 Lafayette Street
Houma, Louisiana 70360
Telephone: (504) 868-2081

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

The record does not in fact present for review the questions stated at page i of the petition for a writ of certiorari. If the record properly presents any question, it is only:

May a party, notwithstanding Rule 51 of the Federal Rules of Civil Procedure, object on appeal to an instruction to the jury to which he did not timely object in the district court?

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OPINIONS AND JUDGMENTS BELOW

The appendices to the petition for a writ of certiorari set out the district court's minute entry on the plaintiff's motion for post-trial relief (Exhibit "A"), the Fifth Circuit's per curiam opinion (Exhibit "B"), and the Fifth Circuit's denial of rehearing (Exhibit "C"). Those opinions are not reproduced again in this brief.

The district court's judgment on the jury verdict is not reproduced in the appendices to the petition, but is included as Appendix A to this brief.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Federal Employers' Liability Act, 45 U.S.C.A. § 54, provides:

> In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

The Jones Act, 46 U.S.C.A. § 688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply....

Rule 51 of the Federal Rules of Civil Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs,

any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

The plaintiff was a seaman and member of the crew of a vessel. While in the employ of defendant Two "R" Drilling Company, Inc., the plaintiff sustained injury. The plaintiff filed this suit for damages against Two "R" and its insurer, Employers Insurance Company of Wausau, under the Jones Act, 46 U.S.C.A. § 688, and the general maritime law. The defendants raised the plaintiff's comparative negligence in mitigation of his recovery. The case proceeded to trial by jury.

The plaintiff submitted no proposed jury instruction in writing on assumption of the risk.

At the first charge conference, the plaintiff, not the defendants, raised assumption of the risk and insisted orally upon an instruction to the jury concerning it. (Transcript p. 308) The defendants said nothing, neither advocating nor opposing the instruction on assumption of the risk upon which the plaintiff insisted. (Tr. pp. 308-309)

The court initially declined to instruct the jury on assumption of the risk because it was not an issue in the case. (Tr. p. 308)

At a second charge conference, however, the plaintiff persisted in his demand for an instruction to the jury on assumption of the risk. (Tr. p. 320) The court relented (Tr. p. 320) and decided to instruct the jury on assumption of the risk. (Tr. pp. 406-407) The court read aloud the charge which the court ultimately gave to the jury (Tr. pp. 320-321) and asked the plaintiff's attorney whether the charge satisfied him. The plaintiff's attorney responded: "Yes, sir, I think it does." (Tr. p. 321) The plaintiff did not object to the instruction on assumption of the risk before the jury retired to consider its verdict.

The relevant portions of the transcript are reproduced as Appendix B to this brief.

The jury found that the employer was not negligent, that the vessel was unseaworthy, and that the plaintiff was comparatively negligent. The trial court entered judgment against the defendants on the jury's verdict, reducing the recovery by the percentage of comparative negligence found.

The plaintiff filed a motion for post-trial relief in the district court, raising for the first time his objection to the instruction on assumption of the risk. The trial court denied that motion.

The plaintiff appealed to the Fifth Circuit, which affirmed.

———o———

ARGUMENT

None of the considerations enumerated in this Court's Rule 17 favoring issuance of the writ is present.

The decisions below conflict with no decision of another federal circuit or of a state court of last resort.

The challenged instruction represents no departure from the accepted and usual course of judicial proceedings. To the contrary, the instruction comes verbatim from the Fifth Circuit's decision in *Reyes v. Vantage S.S. Co.*, 558 F.2d 238, 244 (5th Cir. 1977).

This court settled long ago the substantive question, determining that assumption of the risk, under any guise, neither defeats nor mitigates recovery under the Federal Employers' Liability Act or under the Jones Act. *Owens v. Union P.R.R.*, 319 U.S. 715, 63 S.Ct. 1271, 87 L.Ed. 1683 (1943); *Tiller v. Atlantic C.L.R.R.*, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939). The challenged instruction is consistent with those decisions.

Nor is it a departure from the accepted and usual course of judicial proceedings to disregard an objection to an instruction not made until long after the jury has retired to consider its verdict. To the contrary, the courts below followed the unequivocal dictates of Rule 51 of the Federal Rules of Civil Procedure. Rule 51 is clear. A long and unbroken line of jurisprudence in the lower courts enforces Rule 51 as written. *E.g., Bestway Equip. Serv. v. Berwind Lines*, 655 F.2d 440 (1st Cir. 1981); *Griggs v. Firestone Tire & Rubber Co.*, 513 F.2d 851 (8th Cir. 1975); *Honea v. West Virginia Pulp & Paper Co.*, 380 F.2d 704

(4th Cir. 1967); *Bern v. Evans,* 349 F.2d 282 (8th Cir. 1965); *Western Fire Ins. Co. v. Word,* 131 F.2d 541 (5th Cir. 1943).

Rule 51 is not without its exceptions. Even absent timely objection, a federal appellate court may notice errors which would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Johnson v. United States,* 318 U.S. 189, 200, 63 S.Ct. 549, 87 L.Ed. 704, 713 (1943). There is no showing that adherence in this case to the clear dictates of Rule 51 will have any such effect. Moreover, where the failure to object timely is the result not of mere "inadvertence or oversight", but is rather "accompanied by an express waiver" of an objection, the appellate courts will not consider an untimely objection. *Ibid.* Here, when the district court pointedly asked him whether the proposed instruction on assumption of the risk satisfied him, the plaintiff's attorney responded, "Yes, sir, I think it does." (Tr. pp. 320-321) So this is not a case in which to ignore Rule 51.

The appellate courts may also notice "plain error", even absent timely objection under Rule 51. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981). But review of "plain error" is for "correcting obvious instances of injustice or misapplied law." *Ibid.* Here, the challenged instruction is correct and consistent with the decisions of this Court. This case is not an "obvious instance of injustice or misapplied law."

For this Court to write out Rule 51, or to carve out of Rule 51 an exception excusing this plaintiff's tardy objection, would play havoc with federal trial and appellate

procedure. Trial counsel could cagily lie in ambush, waiting and even hoping for the trial court to instruct the jury erroneously. Trial counsel could refrain from timely objecting to the erroneous instruction, and await the jury's verdict. If the verdict were to turn out favorably, trial counsel would be satisfied. But if the verdict were to turn out adversely, trial counsel could then object for the first time to the instruction, forcing a new trial and/or an appeal. The system would be flooded unnecessarily with motions for post-trial relief, appeals and new trials. Rule 51 offers a far more workable procedure, requiring objection before the jury deliberates, thus affording the trial judge an opportunity to correct erroneous instructions and to avoid unnecessary new trials and appeals.

Assumption of the risk means that a plaintiff is at fault in exposing himself knowingly and voluntarily to the risk in the first place. That was never the defendants' position. Nothing in the defendants' opening statement, closing argument, or anywhere else suggests that the defendants argued assumption of the risk. The record contains substantial evidence that in rigging the scaffolding the plaintiff was less careful than a reasonably prudent rig welder would have been. That is pure comparative negligence. The jury apparently agreed.

The plaintiff implies that only by confusing assumption of the risk and comparative negligence could the jury have returned a verdict that the plaintiff was comparatively negligent to the extent of ninety per cent. A seaman's duty to protect himself from harm is admittedly "slight". *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 223 (5th Cir. 1975). But given the proper facts, a finding of ninety per cent.

comparative negligence is proper. *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 180-181 (5th Cir. 1984). See also *Colomb v. Texaco, Inc.*, 736 F.2d 218 (5th Cir. 1984).

And this is a case in which the jury's finding of ninety per cent. comparative negligence is supported by substantial evidence. As a rig welder, by his own admission, the plaintiff himself was responsible for rigging up the scaffolding he needed to do his job safely. The plaintiff knew how to rig up the scaffolding. He knew that scaffolding was needed for the job. He knew how many boards to put up and how to put the boards up. He knew how to secure the boards, if necessary. He knew how to get help. Nothing he needed was denied him. (Tr. pp. 45-57) The testimony of several other witnesses corroborates the plaintiff's. (See generally the testimony of Dufrene, Tr. pp. 183 et seq., Reeves, Tr. pp. 202 et seq., Richoux, Tr. pp. 60-68, 235-259, and Stanley, Tr. pp. 260 et seq.) Every flaw of which the plaintiff complained was his duty to remedy. The jury reasonably inferred that the plaintiff did not conduct himself, in rigging the scaffolds and in working on them, as a reasonably prudent rig welder would have, and assessed comparative negligence at ninety per cent.

Assessment of a percentage of comparative negligence is a question of fact, peculiarly within the province of the jury. This court should not grant certiorari to review a finding of fact.

———o———

CONCLUSION

This court should deny the petition for a writ of certiorari.

Respectfully submitted,

/s/ PHILIP E. HENDERSON
CHARLES HANEMANN
OF
HENDERSON, HANEMANN & MORRIS
A Professional Law Corporation
300 Lafayette Street
Houma, Louisiana 70360
Telephone: (504) 868-2081

Attorneys for Respondents

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 83-2072

SECTION "G"

RUDY JAMES MARTIN

vs.

TWO R DRILLING CO., INC., ET AL.

JUDGMENT

Considering the verdict of the Jury;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Rudy James Martin, and against defendants, Two R. Drilling Company, Inc. and Employers Insurance Company of Wausau in the amount of $10,361.00 plus interest and costs from date of judgment.

Dated at New Orleans, Louisiana, this 14th day of May, 1984.

/s/ Loretta G. Whyte
CLERK

APPROVED AS TO FORM:

/s/ Morey L. Sear
UNITED STATES DISTRICT JUDGE

APPENDIX B

THE COURT: All right. Mr. Greenberg, you did not submit any objections to the charge, but I understand that you have one.

MR. GREENBERG: Yes, sir.

THE COURT: You may make it now.

MR. GREENBERG: Yes, sir. My objection to the charge is that it contains no reference to the fact that the law abrogates a defense of the assumption of risk, and I felt that a jury charge to that effect should have been appropriate. Secondly—

THE COURT: Let's dispose of that.

MR. GREENBERG: All right.

THE COURT: Since assumption of risk is not pled as a defense, there is no charge at all on the law of assumption of risk. It isn't part of the law that the jury is given to consider. Therefore, they could not consider a defense of assumption of risk.

Transcript p. 308.

THE COURT: . . . This is a case in which, if there is liability, the liability is so tremendously diminished by the comparative negligence of the plaintiff that perhaps it is a proper case in which to at least have the jury aware of its distinction. This is a case, for example, that suggests to me easily a jury's finding, and I have had them before, of liability on the part of the defendant, and a hundred percent contributory negligence on the part of the plaintiff, strange as it might appear. The case that I refer to

is *Reyes versus Vantage Steamship Company,* 558 F.2d 238.

Let me tell you what I intend to do. When we talk about Jones Act defenses, at the bottom of page 14 of the charge, see if you find, "in the favor of the defendant will not prevent his recovery," and so forth. This is what I am going to do. Comparative fault determines the extent, if any, of the seaman's negligence. While the seaman does not assume those risks of the perils of the sea which are inescapable, no risk that can be reasonably controlled by the shipowner is assumed by the seaman, and that should satisfy yours. Does it?

MR. GREENBERG: Yes, sir, I think it does.

Tr. pp. 320-321.

THE COURT: [Instructing the jury.] . . . The defendant contends that the plaintiff was himself negligent and that such negligence was a legal cause of his injuries. This is an affirmative defense and the burden of proving that defense, by a preponderance of the evidence, is upon the defendant, who must establish:

First, that the plaintiff was also "negligent"; and

Second, that the plaintiff's negligence was a "legal cause" of his own damage.

If you find in favor of the defendant on this defense, that will not prevent recovery by the plaintiff; it will only reduce the amount of plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the plaintiff, that his own negligence was, for example, ten percent responsible for his his own damage, then you shall fill in that percentage as your finding on the special

verdict form I will explain to you in a moment. That finding will not prevent the plaintiff from recovery but will merely reduce the plaintiff's total award by the percentage of his negligence that you find. Of course, by using the number ten percent as an example, I do not mean to suggest any specific amount. You may find that the plaintiff was as little as one percent or as much as ninety-nine percent negligent.

Comparative fault determins [sic] the extent, if any, of the seaman's negligence. The defense of assumption of risk is not available in these circumstances. While the seaman does assume the risk of those perils of the sea which are inescapable, no risk that can be reasonably controlled by the ship owner is assumed by the seamen [sic]

. . . .

Tr. pp. 406-407.